

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

JANET E. HENDERSON,

Claimant,

v.

ALLIANT TECHSYSTEMS, INC.,

Employer,

and

BIRMINGHAM FIRE INSURANCE  
COMPANY OF PENNSYLVANIA,

Surety,

Defendants.

**IC 2002-013729**

**FINDINGS OF FACT,  
CONCLUSION OF LAW,  
AND RECOMMENDATION**

Filed: November 20, 2007

**INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in Lewiston, Idaho, on July 19, 2006. Scott Chapman of Lewiston represented Claimant. Bentley Stromberg of Lewiston represented Defendants. The parties submitted oral and documentary evidence. One post-hearing deposition was taken and the parties submitted post-hearing briefs. Claimant submitted an opening brief but did not file a reply to Defendants' post-hearing brief. The matter came under advisement on September 10, 2007, and is now ready for decision.

**ISSUES**

By agreement of the parties at hearing, the issues to be decided are:

1. Whether and to what extent Claimant is entitled to the following benefits:

- a. medical care;
- b. temporary partial and/or temporary total disability benefits (TPD/TTD);
- c. permanent partial impairment (PPI); and
- d. disability in excess of impairment.

Claimant's post-hearing request to reserve the determination of PPI and disability in excess of impairment until such time as Claimant's medical condition is deemed by competent medical testimony as fixed and stable, is denied. Claimant's request to defer these issues was first raised in her post-hearing brief. Defendants object to this request as not being timely made and assert that granting Claimant's request would result in piecemeal litigation as well as Claimant having two bites at the apple.

The issues to be decided were set out in the Notice of Hearing dated January 13, 2006. A teleconference was held on July 5, 2006, at which time the issues were reviewed by both parties. The issues were recited at the outset of the hearing at which time the Referee confirmed with Claimant's counsel that disability in excess of impairment remained an issue in spite of the absence of vocational evidence. A request for modification of the disputed issues should have been raised, at the latest, during the hearing. The Commission has previously denied requests for retention of jurisdiction first raised in post-hearing briefs as untimely. *See, Minchew v. K.C. Construction, Inc.*, I.C. 2002-012003, 2005 WL 3617940 (November 25, 2005).

Claimant's request to retain jurisdiction as to benefits associated with retraining is also denied, for many of the same reasons. Retraining was not identified as an issue for hearing, and the Referee will not address issues first raised in the briefing.

## **CONTENTIONS OF THE PARTIES**

It is undisputed that Claimant injured her left knee on August 23, 2002, while working as an assembler for Employer, was diagnosed with a left knee strain, and received conservative treatment. Claimant contends that she is entitled to unpaid past medical expenses as well as future medical evaluation and treatment. Claimant seeks TPDs and/or TTDs from October 21, 2002, through the present and continuing until she is released to return to work.

Defendants argue that Claimant is not entitled to medical benefits beyond October 3, 2002, or to income benefits beyond October 20, 2002. Specifically, Defendants assert that they are not liable for treatment sought by Claimant outside of the chain of referral of the treating doctor; that Claimant's medical treatment failed to result in gradual improvement; and that Claimant has failed to establish that treatment sought is causally related to her industrial injury. Defendants contend that Claimant's inability to work is unrelated to her industrial injury. Defendants maintain that there is no PPI and that there can be no disability in excess of impairment in the absence of PPI.

## **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The hearing testimony of Claimant;
2. Claimant's Exhibits 1-11, admitted at hearing;
3. Defendants' Exhibits 1-19 and correction page to Claimant's deposition, admitted at hearing;
4. The post-hearing deposition of Bradley Watters, M.D., taken November 27, 2006; and
5. The Idaho Industrial Commission legal file.

## **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION - 3**

Defendants' objection at page 19 of Dr. Watters' deposition is sustained. Testimony and argument by both parties regarding post-hearing evidence will not be considered.

After having considered all the remaining evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusion of law for review by the Commission.

### **FINDINGS OF FACT**

1. At the time of hearing, Claimant was 32 years of age and living in Bremerton, Washington, where she was born and raised. Claimant resided in Lewiston from 1997 through September of 2004. Claimant is a high-school graduate and completed a year and two months of community college course work. Claimant's previous employment includes a paper route, baby-sitting, food processing, and work for a local newspaper, inserting advertisements using a hopper machine.

2. Employer is a munitions manufacturer. Claimant was hired by Employer on July 18, 2002, but did not begin work until August 23, 2002. Claimant's job was to install primer into shell casings and she was required to pick up shell casings that had fallen to the floor. The floor in the area where Claimant worked was intentionally kept wet to prevent sparks resulting from falling primer.

3. Claimant's medical records prior to the industrial injury are voluminous but unrelated to the left knee. At the time of injury, Claimant was receiving on-going medical treatment for asthma, neck pain associated with congenitally fused vertebrae, right foot pain, migraine headaches, recurrent urinary tract infections, pelvic pain and high blood pressure. Claimant's primary care physician was Don Greggain, M.D. Claimant was seen by other

physicians and physician assistants affiliated with Dr. Greggain's practice, including Jayme Mackay, M.D.

4. At approximately 4:00 p.m. on August 23, 2002, her first day of work for Employer, Claimant was picking up shell casings from the floor when she slipped in a puddle and felt her left knee lock. Claimant did not fall to the ground or strike her knee. The injury was unwitnessed.

5. Claimant reported the injury within an hour to Bev Reynolds, who was training Claimant. Ms. Reynolds recommended to Claimant that she report the injury to Ken Able and Claimant did so. Mr. Able offered medical treatment which Claimant declined. Ms. Reynolds subsequently reported that Claimant told her that she did not want to go to a doctor because she did not want to take a drug test.

6. Despite declining several offers of medical care by Employer, Claimant went to the emergency room at Tri-State Memorial Hospital at approximately 7:30 p.m. on the day of injury. A left knee x-ray was obtained and read as normal. Claimant's diagnosis was an acute left knee injury with internal derangement and joint effusion. Claimant was taken off work, given a knee immobilizer, and prescribed medications.

7. Claimant contacted Employer the following day and was referred to O.E. Kaltenbaugh, M.D.<sup>1</sup> Dr. Kaltenbaugh first evaluated Claimant on August 27, 2002. He diagnosed a left knee sprain and possible meniscus tear. A left knee MRI was ordered and performed on August 29, 2002. MRI findings revealed small effusion and medial plica with low grade chondromalacia. No meniscal or ligament tears were identified. Dr. Kaltenbaugh re-

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<sup>1</sup> Claimant was terminated by Employer on September 12, 2002, for failing to contact Mike Cloke, Health Manager, prior to seeking medical treatment at the emergency room. Employer considered this to be a violation of policy and procedure of which Claimant had been informed. Written notice of the termination was provided to Claimant on September 12, 2002.

evaluated Claimant on September 3, 2002, at which time he referred Claimant to physical therapy and opined that the MRI did not show an injury which would require surgical intervention.

8. Claimant attended nine physical therapy sessions from September 5, 2002, until October 2, 2002. Claimant testified that physical therapy did not improve her condition, but the therapy notes reflect decreasing complaints of pain with gains in strength and functioning in late September of 2002. Claimant did not return to physical therapy after October 2, 2002. Claimant cancelled all appointments by phone call of October 9, 2002, secondary to symptoms associated with unrelated laparoscopic surgery performed on October 8, 2002, to address pelvic pain.

9. Claimant followed up with Dr. Kaltenbaugh on October 3, 2002, with complaints of continued left knee pain and swelling. Dr. Kaltenbaugh noted tenderness, no significant effusion, and full range of motion. He changed Claimant's anti-inflammatory medication, provided a tentative return to work date of October 21, 2002, and recommended a follow-up appointment in one month. Claimant failed to appear for her appointment of November 4, 2002, and has not been evaluated by Dr. Kaltenbaugh since October 3, 2002.

10. Surety sent Claimant a Notice of Claim Status on October 15, 2002, advising that benefit payments would stop on October 21, 2002, based on Dr. Kaltenbaugh's release to unrestricted work. The notice indicated that medical coverage would continue until Claimant was released from a doctor's care. Defendants paid TTDs from August 23, 2002, through October 20, 2002.

11. Claimant sought treatment on August 26, 2002, and September 10, 2002, at Dr. Greggain's office for evaluation of high blood pressure. Chart notes for those dates make no mention of Claimant's left knee complaints. Claimant reported stress and anxiety associated

with marital discord and an incident during which her four year old son got his hands on his father's gun and was able to load it. Claimant met with Dr. Greggain on October 8, 2002, at the doctor's request, after he received a letter from the Idaho State Board of Pharmacy regarding Claimant's use of controlled substances. Claimant explained that the medication was for her headaches and that she was feeling better following mental health treatment received in September of 2002.

12. Claimant returned to Dr. Greggain's office on November 2, 2002, and was seen by Dr. Mackay for complaints of left knee pain. Dr. Mackay referred Claimant to Edwin Tingstad, M.D. Claimant acknowledges that she did not seek approval from Defendants or the Commission to change treating doctors from Dr. Kaltenbaugh. Claimant felt that there was no need to communicate with workers' compensation since her benefits had been terminated.

13. Dr. Tingstad evaluated Claimant on November 7, 2002, at which time he noted a slight limp with mild knee effusion. He recommended a repeat MRI and felt that Claimant would most likely benefit from a prolonged course of physical therapy as opposed to surgery. He suspected a chondral injury. A left knee MRI was performed on November 18, 2002, which revealed subtle blurring to the fibers of the anterior cruciate ligament which was a possible indicator of a partial tear of the ACL; minimal patellar chondromalacic changes; trace amount of joint effusion; and otherwise unremarkable findings with no evidence of meniscal tear.

14. Claimant saw Dr. Tingstad on January 20, 2003, for a pre-operative evaluation. Dr. Tingstad noted left knee pain with questionable ACL injury and scheduled a diagnostic arthroscopy for January 22, 2003. The records do not indicate why physical therapy was not pursued or why Dr. Tingstad's treatment recommendation changed from the previous visit. Dr. Tingstad performed an arthroscopic chondroplasty and identified a chondral defect as the

post-operative diagnosis. The operative report describes the mechanism of injury as Claimant falling with her left knee buckling underneath her, a decidedly different mechanism of injury than Claimant had previously reported.

15. Post-operative physical therapy was recommended by Dr. Tingstad at a follow-up visit of February 5, 2003. Chart notes reflect that Claimant called on two occasions during February of 2003 to report losing her prescription and then her bottle of pills. Claimant requested additional OxyContin. In early March of 2003, Claimant reported falling on two occasions, one of which involved being pulled down by her rottweiler. As of March 5, 2003, Claimant had not made it to physical therapy and reported her biggest problem as marital difficulties. Claimant explained that she continued to need pain medication and that she experienced withdrawals without it. Dr. Tingstad recommended a careful taper off pain medication and urged Claimant to attend physical therapy.

16. Claimant was evaluated at Riverside Recovery for substance abuse treatment on April 4, 2003. Claimant testified at the hearing she did not have a drug abuse problem and that the only reason she submitted to treatment was that her then-husband represented to her that her participation would save the marriage. (Tr. p. 57). Claimant's testimony is at odds with the medical records, which note that upon admission to the substance abuse program, Claimant acknowledged that she became "hooked on pain pills" and that the situation had gotten out of hand over the past two months. Claimant reported a nine-year history of prescription drug abuse using Tylenol 3, Morphine, Demerol, Dilaudid, Vicodin, OxyContin, Oxycodone, Xanax, Klonopin, Ativan and a Soma-compound. Def. Ex. 18. A three-phase intensive outpatient program was recommended for Claimant.



17. Claimant attended physical therapy and her condition was significantly improved at the time of her appointment with Dr. Tingstad on April 24, 2003. Claimant had no swelling or effusion and was taking only aspirin for pain. Dr. Tingstad recommended a transition back to work, with restrictions, during early May of 2003. However, Claimant slipped off of a porch and was back to square one by the visit of July 10, 2003. Claimant reported going to the emergency room where she received Toradol and presented with recurring swelling. Claimant last saw Dr. Tingstad on August 14, 2003, at which time she was pain free with mild effusion.

18. Claimant returned to work in March of 2003 for a period of three or four days during which time she worked at a fast food restaurant. Claimant left her job due to escalating marital and personal problems. Claimant worked for a home health care agency from June 25, 2003, through October 16, of 2003, and left that job due to personal problems. Dr. Mackay indicated in October of 2003 that Claimant had light duty physical restrictions due to her knee injury and that her emotional condition prevented her from working more than half time. He indicated that Claimant suffered from depression, migraine headaches, and possible bi-polar personality disorder. Dr. Greggain clarified that Claimant was totally incapacitated in her “present state of mind” due to Claimant’s divorce and related factors.

19. Claimant moved to Bremerton in late October of 2003, following her divorce. Claimant did not seek medical treatment relating to her work injury for approximately six months after August of 2003. Claimant attended one week of physical therapy for her knee in May of 2004. Claimant sought treatment with Bradley Watters, M.D., on June 24, 2004, upon the referral of her mother.

20. Dr. Watters, along with his physician assistant, provided conservative treatment to Claimant in the form of Synvisc injections. He diagnosed chondral damage secondary to post-

traumatic arthritis and noted Claimant's prior arthroscopic surgery. Dr. Watters declined to address causation of Claimant's knee condition and acknowledged that he did not review medical records generated immediately following the injury. Dr. Watters' report of September 15, 2004, documents his concerns about Claimant's emotional status and motivation to participate in conservative care. Reports of Dr. Watters consistently note full range of motion and minimal to no joint effusion. Cl. Ex. 7; Dr. Watters' Depo., pp. 28-30.

21. Claimant applied for Social Security Disability Benefits (SSDI) and asserted an inability to work associated with asthma, migraines, knee problems, high blood pressure, major depression with psychotic features and acute stress disorder. Claimant received a notice of non-entitlement to SSDI benefits in March of 2004. Claimant submitted a request for reconsideration in which she indicated that she continued to be unable to work "or anything of the like" due to depression. Def. Ex. 17.

## **DISCUSSION AND FURTHER FINDINGS**

### ***CLAIMANT'S CREDIBILITY***

22. Claimant's credibility is undermined by multiple instances of drug-seeking behavior and documented abuse of prescription medication described in the medical records. This is especially true in light of Claimant's denial of prescription drug abuse during her testimony. It is difficult to take Claimant's complaints of pain and other symptoms at face value, in light of multiple reports of subjective complaints that are out of proportion with objective physical findings. Further, it is difficult to separate which complaints are directly related to the industrial injury as opposed to Claimant's mental state and unrelated health issues. Claimant's first day of work for Employer coincides with a period of prescription drug use sufficient to

generate a letter of concern from the Idaho State Board of Pharmacy, and perhaps explains Claimant's disinclination to submit to a post-injury drug test.

### ***MEDICAL BENEFITS***

23. Generally, an employee is entitled to reasonable medical treatment for a compensable injury. Idaho Code § 72-432(1). The determination as to whether or not a specific treatment is reasonable and required is determined by the employee's physician. *Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 722, 779 P.2d 395, 397 (1989). However, the Claimant bears the burden of proving that the condition for which treatment is sought is causally related to the compensable injury. *Sweeney v. Great W. Transp.*, 110 Idaho 67, 71, 714 P.2d 36, 40 (1986). When medical care is determined to be reasonable and causally related to a compensable injury, the injured worker is treated by, or at the direction of, or upon referral from the treating physician. If a claimant seeks medical care outside the chain of referral without approval of the surety or a Commission order pursuant to Idaho Code § 72-432(4), the employer/surety may be relieved of the obligation to provide reasonable medical care. *Quintero v. Pillsbury Co.*, 119 Idaho 918, 811 P.2d 843 (1991).

24. Claimant voluntarily discontinued medical treatment with Dr. Kaltenbaugh. Claimant failed to appear for her scheduled appointment of November 4, 2002, and discontinued physical therapy on October 9, 2002. Surety paid medical benefits for treatment by or at the referral of Dr. Kaltenbaugh and specifically notified Claimant that her medical benefits would continue even though income benefits were being suspended. Claimant opted to seek treatment outside of Dr. Kaltenbaugh's chain of referral and did not seek approval to change treating physicians from Defendants or the Commission.

25. In order for Employer/Surety to be liable for Claimant's treatment outside the chain of referral, Claimant must establish, among other requirements, that the treatment she received after leaving Dr. Kaltenbaugh's care is related to her industrial injury. Claimant has failed to establish that treatment she received from Dr. Tingstad or Dr. Watters is medically related to her injury. The medical records reference multiple falls subsequent to the industrial injury as well as a six-month gap in treatment for the injury near the time of Claimant's relocation from Lewiston to Bremerton.

26. Dr. Tingstad's records capture Claimant's report of her industrial injury but do not include any medical opinion relating Claimant's chondral defect to her industrial accident. In fact, Dr. Tingstad's records include two very different mechanisms of injury (knee locked up/fell striking knee) and no clear statement that either mechanism of injury more likely than not caused Claimant's chondral defect. Following her move to Bremerton, Claimant sought treatment from Dr. Watters, who specifically declined to offer any opinion as to the cause of Claimant's left knee complaints.

### ***TTDs***

27. Pursuant to Idaho Code § 72-408, a claimant is entitled to income benefits for total and partial disability during a period of recovery. The burden of proof is on the claimant to present expert medical evidence to establish periods of disability in order to recover income benefits. *Sykes v. C.P. Clare & Company*, 100 Idaho 761, 763, 605 P.2d 939, 941 (1980). Defendants have paid TTDs from the date of injury through October 20, 2002.

28. Claimant has failed to meet her burden of proof to establish entitlement to income benefits beyond October 20, 2002, the date Dr. Kaltenbaugh released Claimant to return to work. Claimant underwent laparoscopic surgery on October 8, 2002, to address pelvic pain that was not

## **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION - 12**

associated with the industrial knee injury. Claimant subsequently became unable to work because of her emotional and mental difficulties associated with marital problems and substance abuse. No physician has offered an opinion contrary to Dr. Kaltenbaugh's determination that Claimant's knee was not a hindrance to a return to employment on October 21, 2002.

29. Dr. Tingstad subsequently took Claimant off work for arthroscopic knee surgery of January 22, 2003, but the medical evidence fails to establish a causal relationship between that surgery and Claimant's industrial injury. There is no explanation of why Dr. Tingstad considered Claimant's knee non-surgical both before and after the second MRI in November 2002, and then performed arthroscopic surgery in January 2003. Nor is there any medical evidence connecting Claimant's chondral defect to her industrial injury (*See*, finding of fact 26, *infra*).

#### ***PPI AND DISABILITY IN EXCESS OF IMPAIRMENT***

30. "Permanent Impairment" is an anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and a claimant's condition is considered medically stable. Idaho Code § 72-422. When determining impairment, the opinions of physicians are advisory only and the Industrial Commission is the ultimate evaluator of impairment. *Urry v. Walker & Fox Masonry Contractors*, 115 Idaho 750, 769 P.2d 1122 (1989). Without permanent impairment, there can be no permanent disability. *Id.*

31. The evidence is void of medical evidence that either asserts the existence of and/or quantifies permanent impairment associated with the industrial knee injury. Rather, the evidence suggests multiple barriers to gainful employment and a reduction of Claimant's capacity for gainful activity that are unrelated to the industrial injury. Claimant has failed to

meet her burden of proof to establish permanent impairment or disability in excess of impairment.

### **CONCLUSION OF LAW**

1. Claimant has failed to carry her burden of proving her entitlement to additional medical care or income benefits relating to her August 23, 2002, industrial injury.

### **RECOMMENDATION**

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusion of law and issue an appropriate final order.

DATED this 8 day of November, 2007.

INDUSTRIAL COMMISSION

/s/\_\_\_\_\_  
Rinda Just, Referee

ATTEST:

/s/\_\_\_\_\_  
Assistant Commission Secretary

### **CERTIFICATE OF SERVICE**

I hereby certify that on the 20 day of November, 2007 a true and correct copy of **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

SCOTT CHAPMAN  
PO BOX 446  
LEWISTON ID 83501-0446

BENTLEY G STROMBERG  
PO BOX 1510  
LEWISTON ID 83501-1510

djb /s/\_\_\_\_\_



**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

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Claimant,

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**IC 2002-013729**

**ORDER**

Filed: November 20, 2007

Pursuant to Idaho Code § 72-717, Referee Rinda Just submitted the record in the above-entitled matter, together with her proposed findings of fact and conclusion of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with this recommendation. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusion of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant has failed to carry her burden of proving her entitlement to additional medical care or income benefits relating to her August 23, 2002, industrial injury.



2. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 20 day of November, 2007.

INDUSTRIAL COMMISSION

/s/\_\_\_\_\_  
James F. Kile, Chairman

/s/\_\_\_\_\_  
R.D. Maynard, Commissioner

/s/\_\_\_\_\_  
Thomas E. Limbaugh, Commissioner

ATTEST:

/s/\_\_\_\_\_  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 20 day of November, 2007, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following persons:

SCOTT CHAPMAN  
PO BOX 446  
LEWISTON ID 83501-0446

BENTLEY G STROMBERG  
PO BOX 1510  
LEWISTON ID 83501-1510

djb

/s/\_\_\_\_\_